



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

May 24, 1996

David R. Smith, M.D.  
Commissioner of Health  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

Letter Opinion No. 96-058

Re: Whether various testing committees or other entities that approve the contents of a licensing examination may meet in executive session to discuss test questions and answers (ID# 36466)

Dear Dr. Smith:

You have requested our opinion regarding whether various testing committees or other entities that approve the contents of a licensing examination may meet in executive session to discuss test questions and answers.

You explain that the Department of Health uses testing committees to draft and give final approval to questions and answers for examinations conducted by a number of boards which license health care professionals. The test items themselves are excepted from the disclosure requirements of the Open Records Act. See Gov't Code § 552.122. You inform us that meetings of the testing committees are conducted in accordance with the Open Meetings Act, chapter 551, Government Code. On the basis of that information, we assume that the committee is a governmental body subject to the act. Since, however, the members obviously cannot freely discuss the test questions and answers in a meeting that is open to the public, you contend that the effectiveness of the committees is greatly reduced. For that reason, you ask whether a committee may conduct an executive session, in accordance with statutory procedures, to enable its members, openly and without encumbrance, to consider and review the relevant test items.

As we indicated in Attorney General Opinion DM-284,

[p]rior to 1982, this office stated on several occasions that a governmental body could deliberate in a closed session about confidential information, even though no Open Meetings Act provision authorizing a closed session applied to the deliberations. See, e.g., Attorney General Opinions H-1154 (1978); H-780 (1976); H-484 (1974). In Attorney General Opinion MW-578 (1982), however, this office concluded that closed meetings may be held only where specifically authorized.

Attorney General Opinion DM-284 (1994) at 16. Such "specific authorization" must come from the Open Meetings Act itself, or from another statute clearly indicating that a meeting is not open to the public. A statute which merely prohibits board members from

revealing particular information is not in itself sufficient to authorize an executive session. *E.g., id.*

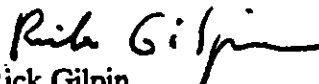
No provision of subchapter D, chapter 551, Government Code, which permits a board to meet in closed session under certain narrowly defined circumstances, would justify such a session in the kind of situation of which you inquire. Neither are we aware of any statute sufficiently specific to authorize an executive session to discuss test items. Such statutes are rare. In Attorney General Opinion DM-284, a statute establishing the Texas Title Insurance Guaranty Association stated that meetings of the board are "not open to the public." *Id.* at 15 (quoting Ins. Code art. 9.48, § 14(e)(3)). In Attorney General Opinion JM-645, this office said that, since the procedural requirements of the Administrative Procedure Act created an executive session exception in contested cases, the Public Utility Commission could conduct an *in camera* review of documents or hold a closed meeting to decide a claim or privilege in a contested case, *provided* that the claim was made in a proceeding under the Administrative Procedure and Texas Register Act (now the Administrative Procedure Act), *and* resolution of the claim required examination *and* discussion of the allegedly privileged information. Attorney General Opinion JM-645 (1987) at 6. If, however, the commission was able to discuss and determine the question of privilege without revealing the substance of the information, it was not permitted to meet in executive session to resolve the matter. *Id.* Likewise, Attorney General Opinion DM-284 indicated that a board of directors which was not specifically authorized to conduct a closed session "could choose to avoid disclosing the substance of such a report by refraining from discussing its particulars in a public meeting." Attorney General Opinion DM-284 (1994) at 17.

However inconvenient it may be for the various testing committees to resort to stratagems to avoid revealing the content of test items in an open meeting, and to whatever extent their effectiveness is thereby reduced, we believe that the solution is one for the legislature. Accordingly, it is our opinion that testing committees of the Department of Health that review and approve the contents of licensing examinations may not meet in executive session to discuss test questions and answers.

### S U M M A R Y

Testing committees of the Department of Health that review and approve the contents of licensing examinations are not authorized to meet in executive session under the Open Meetings Act, Government Code, chapter 551, to discuss test questions and answers.

Yours very truly,

  
Rick Gilpin  
Deputy Chief  
Opinion Committee